

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**Remedying Undue Discrimination through
Open Access Transmission Service and
Standard Electricity Market Design**)

Docket No. RM01-12-000

**COMMENTS OF THE
ILLINOIS COMMERCE COMMISSION**

Pursuant to the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) notices issued July 31, 2002, September 10, 2002, and October 2, 2002, in the above-captioned proceeding, the Illinois Commerce Commission (“ICC”) hereby submits its comments on the issues of: (1) independent transmission providers (“ITPs”); (2) the role of independent transmission companies (“ITCs”) in standard market design (“SMD”); (3) SMD efficiency improvements; (4) market monitoring and market power mitigation; (5) regional transmission organization (“RTO”)/ITP governance, (6) liability limitations in the RTO/ITP context; and (7) bundled retail transmission.

I. BACKGROUND

On July 31, 2002, the Commission issued the Standard Market Design Notice of Proposed Rulemaking (“NOPR”) wherein the deadline for comments was set for October 15, 2002.¹ On September 10, 2002, the Commission issued an extension of the comment deadline to November 15, 2002. On October 2, 2002, the Commission issued a second extension regarding

¹ *Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design, Notice of Proposed Rulemaking*, 100 FERC ¶ 61,138 (2002) (*hereinafter*, “NOPR”).

the comment deadline. The deadline for Comments addressing the following issues was extended to January 10, 2003: (1) market design for the Western Interconnection; (2) transmission planning and pricing, including participant funding; (3) regional state advisory committees and state participation; (4) resource adequacy; and (5) congestion revenue rights and transition issues. The deadline remains November 15, 2002, for the remaining issues. The ICC herein provides its Comments on those remaining issues.

II. EXECUTIVE SUMMARY

The ICC appreciates the opportunity to comment in this proceeding and generally supports the Commission's proposal to require all public utilities with open access transmission tariffs ("OATTs") to modify their tariffs to reflect non-discriminatory, consistent transmission service and compatible wholesale electric market design. However, there are a number of areas in the NOPR that require clarification and, in some instances, changes to the Commission's SMD proposal.

Independent Transmission Providers – In the NOPR, the Commission introduced for the first time the idea of establishing entities to be called ITPs. The NOPR states that a Commission-approved RTO will qualify as an ITP, but that other entities that fall short of the characteristics and functions needed to qualify as RTOs may, nevertheless, qualify as ITPs. The Commission's continued attention to independence as a necessary characteristic for transmission providers is commendable, but the Commission's step backwards from an RTO implementation agenda will likely be counterproductive.

Rather than pursue the ITP approach introduced in the NOPR as an interim step, the ICC urges the Commission to continue to move toward prompt and full participation by transmission-owning utilities in properly designed and properly configured RTOs, as envisioned in Order

2000, operating coordinated wholesale power markets as envisioned for ITPs in the NOPR. The protracted transition to competitive wholesale electricity markets that will result from adopting an interim ITP step, rather than moving directly to RTOs, will compound costs and market uncertainties as institutions are set up and subsequently disregarded to build new institutions that satisfy the Order 2000 RTO standards.

Finally, the transitional ITP step introduced in the NOPR, and the Commission's nationwide market standardization efforts, should not be permitted to hinder continued rapid progress in areas of the country such as the Midwest where a great deal of consensus has already been achieved regarding competitive market objectives shared by both the Commission and stakeholders—objectives which appear in the NOPR but for which the NOPR, in some ways, is inadequate to achieve. The potential difficulty faced by the Commission in implementing the NOPR nationwide should not be permitted to hinder continued pro-competition progress in forward-looking areas of the country such as the Midwest.

Role of Independent Transmission Companies in Standard Market Design – Addressing the role of ITCs within an RTO/ITP framework and standard market design continues to be difficult because there is no single commonly accepted definition of what constitutes an ITC. The NOPR's proposed allocation of operational authority and transmission planning and expansion responsibilities to ITCs has the potential to conflict with provisions set forth by the Commission in its recent *TRANSLink* Order in the areas of planning, scheduling and tariff transaction responsibility within the ITC footprint. Depending on the business design adopted by the ITC, it may be appropriate for the Commission to revisit its previous determinations concerning allocation of functions between RTOs and ITCs as new ITC filings are made.

Standard Market Design Efficiency Improvements – The ICC supports the Commission’s proposal to require the costs of capacity benefit margin (“CBM”) to be allocated to customers deriving the benefits of CBM and to prevent transmission owners from manipulating transmission capacity under the guise of CBM to favor affiliated merchant generators. Also, the Commission should ensure that transmission capability transfer calculations are performed by an independent entity and that the analytical methods for conducting power flow analyses are transparent. Finally, the Commission should continue to maintain the seven-factor test for the delineation of facilities because it focuses on all factors contributing to the actual function of the line rather than just the line’s voltage rating.

Market Monitoring and Market Power Mitigation –The success of FERC’s market monitoring and market power mitigation proposal depends on the independence of the Market Monitor (“MM”) from both the ITP and market participants. However, the framework established by the Commission for market monitoring in Order 2000 (and largely retained in the SMD NOPR) makes it very unlikely that the MM will be independent of the ITP and market participants.

In addition, the MM must be clearly accountable to the Commission, rather than to both the Commission and the ITP Board, as proposed in the NOPR. The ICC position continues to be that the MM should be a contract agent of the Commission, rather than of the ITP. The market monitoring framework introduced in Order 2000, and largely retained in the NOPR, fails to establish the proper relationship between the MM, the Commission and the RTO/ITP.

All information collected by the MM should be made available to the state commissions, provided that confidential information is protected. It should not be presumed that all

information collected by the MM from market participants merits confidential treatment. Market participants should be responsible to support any claims of confidentiality.

The MM must be authorized to monitor and critique all aspects of the operations and practices of an RTO/ITP including, but not limited to, market design, provision of ancillary services, tariffs, scheduling, interconnection and planning practices. Such critique will provide greater assurance that the RTO/ITP is operating in an efficient manner without discrimination against any market segment. Given the division of functions between the ITCs and RTO/ITPs, as well as the MM's responsibility for monitoring all aspects of the RTO/ITP, the MM should also have authority to evaluate the operations and governance of any ITCs operating within the RTO/ITP.

Market power mitigation will be necessary in areas described by the Commission as exhibiting "local market power problems". However, using participating generator agreements to address ownership concentration local market power problems as proposed in the NOPR opens the door to non-uniform and discriminatory treatment of similarly situated generators. Addressing this part of the local market power problem through the ITP's market power mitigation plan developed by the MM would ensure consistency as well as transparency.

The MM should be able to implement an automatic mitigation procedure (as that procedure is described in the NOPR) in any of the markets that it oversees. An automatic mitigation procedure should be mandatory for any ITP whose market monitor shows it to be necessary. The need for an automatic mitigation procedure will likely be widespread and may need to be imposed across fairly large regions.

Finally, the ICC is concerned that the MM penalty authority is not clear. The NOPR contains contradictory language in this regard. Accordingly, the Commission should clarify the

issue of market power mitigation enforcement and penalties for market participant failure to comply with market power monitoring and mitigation requirements.

RTO/ITP Governance – The ICC supports the Commission’s objectives for RTO/ITP Board of Director (“Board”) independence, as well as Board quality and clarity in Board obligations with respect to competitive market development. In particular, the ICC supports the Commission’s proposal to require the RTO/ITP Board to adopt an explicit commitment to operate transmission systems under its control in a fair and non-discriminatory manner and to promote development of competitive wholesale power markets. The marketplace would benefit from an RTO/ITP Board that is counseled by an advisory committee where recommendations are derived from the input of all interest segments of the industry and the state commissions. The ICC believes, however, that the NOPR’s restrictions with respect to Board member selection, Board member replacement, and Board member terms may stifle legitimate creativity in these RTO/ITP governance elements. The ICC suggests that a case-by-case review approach to these particular issues would be more productive.

Also, the NOPR’s proposal to create a subset of stakeholders in the form of a nominating committee to select the RTO Board is flawed: it requires stakeholder sectors that may have significant internal diversity to select only two representatives from among their ranks to be on the nominating committee. This “representative” approach is not well designed to allow all diverse individual stakeholder interests to have a role in Board member selection. Neither is it well designed to lead to Board member independence. In short, it advances neither of the important goals for a Board member selection process.

Liability Limitations With Respect To Claims Of Third Parties Should Remain A Matter Of State Law Where Protection Exists – The Commission should support existing state-level

regulatory frameworks for liability. In Illinois, for example, the state continues to regulate public utilities, including transmission-owning entities. The ICC recommends, therefore, that the Commission should work in conjunction with the existing state laws and tariff obligations concerning liability. In particular, the ICC urges the Commission to maintain its long-standing policy of deference to the states on liability limitations with respect to third parties.

Bundled Retail Transmission – The ICC regulates bundled retail service in Illinois under the retail open access framework set forth by the Illinois General Assembly in the 1997 Electric Restructuring Act. While the ICC supports the Commission’s goal of eliminating undue discrimination in interstate transmission service, the Commission’s efforts must complement and not undermine or conflict with Illinois’ retail competition program. In particular, the Commission should avoid actions that would disrupt the balance struck by the Illinois retail rate freeze.

III. Communications

Communications in this proceeding should be directed to the following:

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IV. DISCUSSION

A. Independent Transmission Providers

In an effort to eliminate discrimination regarding access to transmission service, the Commission proposes that all transmission service must be provided by an independent entity.

To this end, the Commission proposes to require all public utilities that own, control or operate facilities used for the transmission of electric energy in interstate commerce to: (1) meet the definition of ITP; (2) turn over the operation of its transmission facilities to an RTO that meets the definition of ITP; or (3) contract with an entity that meets the definition of ITP to operate its transmission facilities. FERC states that public utilities that are already members of an approved RTO or ISO may petition the FERC for a finding that their RTO/ISO already satisfies the new ITP requirement.²

The Commission defines an ITP as any entity that (1) owns, controls or operates facilities used for the transmission of electric energy in interstate commerce; (2) administers the day-ahead and real-time energy and ancillary services markets in connection with its provision of transmission services pursuant to the SMD Tariff; and (3) is independent (i.e., has no financial interest, either directly or through an affiliate, in any market participant in the region in which it provides transmission services or in neighboring regions).³ Accordingly, a FERC-approved RTO will qualify as an ITP, but other entities that fall short of satisfying the Commission's Order 2000 RTO standards and characteristics would also be able to qualify as an ITP and obtain the right to implement the Commission's proposed SMD tariff.

The ICC has long supported the concepts of regional transmission service provided via an independent transmission entity and independent wholesale market operation. Indeed, the ICC has consistently supported the Commission's Order 2000 goal of having all transmission-owning utilities participate in an RTO as soon as feasible.⁴ RTOs remain the best vehicle for achieving the Commission's Order 2000 goals as well as the Commission's NOPR goals.

² NOPR, at ¶ 127.

³ NOPR, at ¶ 126.

⁴ *Regional Transmission Organizations*, Order No. 2000, FERC Stats & Regs., ¶ 31,089 at 31,229 (2000), *order on rehearing*, Order No. 2000-A, FERC Stats & Regs. ¶ 31,092 (2000).

Consequently, it is unclear why the Commission adopted the NOPR's ITP approach rather than continuing on its previous path to RTO implementation. The Commission has spent almost a decade attempting to eliminate discrimination in transmission service. Pursuit of an interim ITP approach, as proposed in the NOPR, has the potential to prolong the already protracted transition to competitive wholesale electricity markets. Further, such an extended transition would require expenditures to establish and then dismantle interim structures while perpetuating market uncertainty. Accordingly, the ICC urges the Commission to act decisively to move toward full participation by transmission-owning utilities in properly designed and properly configured RTOs (as envisioned in Order 2000) operating coordinated power markets (as proposed for ITPs in the NOPR).

In any event, regardless of how the Commission ultimately proceeds with its ITP proposal, and with its standardized market design proposal, it should be cautious to avoid taking any steps that would hinder continued positive progress in regions, such as the Midwest, where considerable progress has already been made in RTO development (i.e.- Midwest ISO and PJM) and in the development of wholesale competitive market institutions. For these areas, the Midwest in particular, the ITP concept and the possible difficulty the Commission faces in implementing its NOPR nationwide, cannot be allowed to become barriers to implementing Order 2000's objectives for RTOs or the SMD NOPR's objectives for competitive wholesale power market development.

B. Role of Independent Transmission Companies in Standard Market Design

The Commission seeks comment regarding the functions that an ITC should perform under the SMD.⁵ Specifically, the Commission asks whether the delegation of functions as

⁵ NOPR, at ¶ 134.

outlined in the Commission's recent TRANSLink Order⁶ should be retained and whether there are elements of the proposed SMD that would justify a different delegation of functions.⁷ The Commission also asks whether an ITC should qualify as an ITP.⁸

The ICC is concerned that there is no commonly accepted definition of what constitutes an ITC and that the Commission has not provided a definition in the NOPR. However, the ICC position is that the two most important elements of an ITC definition would be the degree of independence and business design. Clarification on these critical ITC elements are crucial for definitive responses to the Commission's questions in the proposed rule.

Regarding the split of functions between an ITC (as ITCs have developed) and an ITP (as that concept is defined in the NOPR), the ICC finds that potential for conflict exists between what is outlined in the Commission's *TRANSLink* Order⁹ and the proposed regional transmission planning and expansion process and the congestion management process that is proposed in the NOPR.¹⁰

The first potential conflict is that the *TRANSLink* Order would allow an ITC to perform the planning and expansion functions for the portion of the electric grid within the ITC's footprint.¹¹ Under *TRANSLink*, the ITC would be able to develop its own plan for construction

⁶ *TRANSLink Transmission Company, LLC*, 99 FERC ¶ 61,106 (2002) (*hereinafter*, "*TRANSLink*"). In *TRANSLink*, the Commission granted *TRANSLink*'s proposal to form an ITC, as modified therein, and authorized the disposition of operational control of certain jurisdictional facilities from public utilities to the Midwest ISO and *TRANSLink*. Under this framework, *TRANSLink* will provide open access transmission service on an unbundled basis over a number of interconnected transmission facilities, including those of Alliant Energy Corporate Services, Inc.'s (Alliant). *TRANSLink* will also exert operational responsibility for and provide transmission services over non-jurisdictional systems of certain public power districts and an electric power cooperative. *TRANSLink* will take applications for and schedule transmission service with a source and sink inside its footprint under its own OATT. *Id.* The geographic configuration of *TRANSLink* includes a utility system with subsidiaries operating in both the Eastern Interconnection and the Western Interconnection, so not all of the transmission facilities committed to *TRANSLink* will be able to participate in a single RTO.

⁷ *Id.*

⁸ *Id.*

⁹ *TRANSLink Transmission Company, L.L.C.*, et al. 99 FERC ¶61,106, (April, 2002).

¹⁰ NOPR, at ¶ 335 and 203, respectively.

¹¹ *TRANSLink*, at 61,478.

of transmission and submit that plan to the ITP and coordinate with the ITP to the maximum extent practicable.¹² However, the ITC would not need the ITP's consent to implement the plan.¹³ Moreover, *TRANSLink* would limit the ability of the ITP to oppose the ITC expansion plan to situations where the expansion would have a negative impact on the grid outside of the ITC's footprint.¹⁴

This framework for planning and expansion of the transmission grid within the ITC's footprint conflicts with the regional planning process framework being proposed in the NOPR where the ITP is required to issue requests for proposals ("RFPs") for projects to address uneconomic congestion problems, rather than allowing the ITC to unilaterally decide what action or inaction to take. Allowing an ITC to decide what improvements its transmission system needs and when, or who, will build it is not consistent with the regional planning process described in the NOPR.

A second potential conflict regarding the split of RTO functions suggested in the NOPR and what was adopted in *TRANSLink* is the ability of the ITC to both schedule transmission and conduct tariff transactions within the ITC's footprint.¹⁵ Under an efficient application of the Commission's proposed locational marginal pricing ("LMP")-based system, the market operator will perform functions such as scheduling transactions and the dispatch and re-dispatch of generators. Allowing an ITC to schedule and conduct tariff transactions within the ITC's footprint under LMP is likely to cause inefficiencies and has the potential to result in a bifurcation of the electricity market, especially if a single market approach is not used. Addressing the Commission's inquiry regarding the criteria to be used in determining whether an

¹² *TRANSLink*, at 61,471.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *TRANSLink*, at 61,462.

ITC is suitable to serve the role of ITP,¹⁶ it is the ICC position that only ITCs that are both truly independent and capable of meeting all of the Order 2000 functions and characteristics should be granted ITP status. Of those functions and characteristics, proper scope and configuration, and independence are critically important for achieving properly functioning markets. To achieve independence, in particular, an ITC ideally should own the facilities that it operates. Should ITCs be unable to satisfy these standards, they should not be granted ITP status.

C. Standard Market Design Efficiency Improvements

1. Capacity Benefit Margin

The Commission proposes to standardize the treatment of CBM to ensure that only customers benefiting from CBM pay for CBM and that transfer capability needed to access resources on a neighboring system is treated consistently with all other portions of the transmission grid.¹⁷ The original intent of CBM is to allow load-serving entities to reduce the amount of physical generation needed in their control area by setting aside transfer capability to ensure access to generators in neighboring control areas. However, as the Commission points out, there are customers currently paying for CBM that are not deriving any benefits from CBM.¹⁸ Accordingly, the Commission should eliminate this subsidy and directly assess the costs of CBM to customers that are deriving the benefits of CBM.

Further, as the Commission explained, current CBM practices provide transmission owners with the ability to manipulate transmission capacity under the guise of CBM to favor affiliated merchant generators.¹⁹ Continuation of FERC's current CBM policies could result in impediments to market development to the detriment of states such as Illinois that are pursuing

¹⁶ NOPR, at ¶ 135.

¹⁷ NOPR, at ¶ 331.

¹⁸ NOPR, at ¶ 330.

¹⁹ NOPR, at ¶ 69.

competitive wholesale and retail markets. Accordingly, the ICC supports policy reform in these areas.

2. Available Transmission Capacity

The Commission proposes to require that the ITP be responsible for performing all transmission capability calculations and transmission studies.²⁰ In general, under the current system of physical transmission rights, allowing transmission owners to calculate transmission related figures, such as available transmission capacity (“ATC”), or to perform transmission facility studies necessary for the interconnection of new generation, provide transmission owners with the ability to shield either their own or an affiliate’s generation from competing generation. Unbiased calculation of physical transfer capability is critical for market participants to assess risk in undertaking transactions. Accordingly, it is critical that an independent entity, such as an ITP, provide such services.

When the Commission moves beyond the current physical rights approach in favor of its proposed LMP-based approach, the calculation of ATC will no longer be necessary: nodal prices and redispatch according to ITP power flow analyses will determine which transactions will be executed. While the LMP approach will ultimately make the posting of physical ATC an anachronism, it will still be necessary for the ITP to calculate physical transfer capability until the proposed LMP system is fully operational.

Under the proposed LMP system, the ITP will be responsible for bid-based, security-constrained economic dispatch of the system. To ensure transparency and instill confidence in market participants that the ITP is indeed performing an optimal dispatch, the Commission should ensure that all data and information used by the ITP to determine the hourly economic dispatch is electronically accessible to interested parties, perhaps on a reasonable time lag.

²⁰ NOPR, at ¶ 334.

Without access to data and information such as the transmission system parameters, hourly base-cases, and nodal source and sink data, doubt may remain regarding the ITP's dispatch decisions. Finally, the historical base case data underlying the ITP's hourly dispatch may be useful for market power analysis purposes.

3. Transmission Facilities that must be under Control of an ITP

The Commission seeks comment regarding a bright line voltage test to either replace, or be used in conjunction with, the Commission's current seven-factor test to determine which facilities are to be placed under the control of an ITP.²¹ The Commission suggests 69 kV as the point of demarcation.²² The ICC recommends that a bright line voltage test for these purposes not be adopted.

On its face, the bright line voltage test appears to have the potential to eliminate ambiguity in determining the classification of a specific power line. However, upon closer inspection, it is unclear what benefits would be derived from adopting that bright-line voltage test. One advantage that the seven-factor test offers over a bright line voltage test is that the seven-factor test focuses on the actual function of the line, rather than just the line's explicit voltage rating, which is only one element of the seven-factor test. In states such as Illinois that have both large population centers and expansive rural areas, different lines with similar voltage ratings will be used to perform both the distribution and transmission of electricity. Significantly, the seven-factor test is now being used by states with retail access programs to determine which facilities are critical to performing the distribution function. In implementing its retail access program, the ICC successfully used the seven-factor test to delineate between distribution and transmission facilities. Accordingly, if the Commission adopts an explicit bright

²¹ NOPR, at ¶ 369.

²² *Id.*

line test as proposed, a state's ability to ensure the reliable distribution of electricity could be compromised and the classification of utility facilities already made under the seven factor test would likely have to be revised.

Therefore, the ICC urges the Commission to not implement a bright line voltage test. Instead, the Commission should maintain the seven-factor test by which state commissions classify facilities as either distribution or transmission. Those facilities that are classified as transmission should be put under the control of an ITP/RTO.

D. Market Monitoring and Market Power Mitigation

The ICC agrees with the purposes and objectives of market monitoring and market power mitigation as described by the Commission.²³ Given that wholesale electric markets are not yet structurally competitive, it is unreasonable to expect the unmitigated interaction of demand and supply to assure competitive outcomes or just and reasonable prices in all cases. Market monitoring and market-power mitigation measures can help minimize the negative impact that major structural defects such as load pockets and poor demand response can have on wholesale markets by approximating the outcomes that would be produced in a competitive market. While market monitoring and market power mitigation measures can effectively protect consumers from market power abuse and artificially high prices in markets that are not competitive, the Commission must be careful to not allow them to inhibit market operation in more competitive markets. Accordingly, effective market monitoring and market power mitigation measures will be vital to the creation and continuation of competitive regional bulk power markets.

1. Market Monitor Independence and Accountability

The two most critical features for market monitors are: (1) independence from market participants and the ITP and (2) clear accountability to the Commission. In the NOPR, the

²³ NOPR, at ¶ 390 through ¶ 456.

Commission expresses support for these features,²⁴ but the framework for market monitoring introduced in Order 2000, and largely retained in the SMD NOPR, is not well designed to accomplish these dual goals.

The Commission states that, “[m]arket monitoring should be conducted on an on-going basis by a market monitoring unit that is autonomous of the Independent Transmission Provider’s management and all market participants.”²⁵ The ICC supports this statement and agrees that the market monitor (“MM”) must be autonomous (i.e., independent) of the ITP’s management and all market participants. However, in order for the MM to be genuinely independent of the ITP, it must be independent of its Board of Directors (“Board”) as well as its management. The proposed rule does not accomplish this.

The NOPR states that the MM should be accountable to both the Commission and the ITP Board.²⁶ It is a contradiction to ask the MM to be independent of ITP influence and also require it to be accountable to the ITP Board. The ICC recommends that this flaw in the proposed rule be corrected. The MM’s accountability must be clear and that accountability should be, first and foremost, to the Commission. The Commission should not delegate any part of its market oversight responsibilities to ITP Boards.

In past comments to the Commission, the ICC has pointed out that it is simply not reasonable to expect the MM to be accountable to the Commission and independent of the RTO under a market monitoring framework in which the MM: (1) is selected by the RTO; (2) contracts with the RTO; (3) has its budget set by the RTO; (4) has the terms of payment controlled by the RTO; (5) has its invoices paid by the RTO; (6) issues reports to the RTO; (7) advises the RTO; (8) testifies on behalf of the RTO; and (9) has its re-appointment as MM in

²⁴ NOPR, at ¶¶ 429, 430.

²⁵ NOPR, at ¶ 429.

²⁶ NOPR, at ¶ 429.

subsequent periods subject to the pleasure of the RTO.²⁷ Yet, the NOPR does little or nothing to change these flawed features of the market monitoring framework. The ICC recommends that the Commission correct these inconsistencies.

It remains the ICC's position that the MM should be a contract agent of the Commission, rather than of the ITP. The MM: (1) should be funded through a mechanism separate from the ITP's funding mechanism with the MM budget determined annually in a Commission proceeding open to comments by the public; (2) should report directly to the Commission (this contrasts to the NOPR proposal for the MM to merely issue reports to the Commission); and (3) should take direction directly from the Commission (i.e., be accountable to the Commission), rather than the ITP Board as proposed in the NOPR. Such an approach will allow the Commission to carry out its obligations under the Federal Power Act ("FPA")²⁸ and provide transparency regarding the funding of the MM and leave no doubt as to the independence of the MM from the ITP and accountability of the MM to the Commission.

Finally, to further assure the independence and objectivity of the MM, the Commission should impose stringent "conflict of interest" rules on the MM. Just as the accounting industry is now evaluating whether to require firms to separate their audit and consulting functions, FERC should consider requiring a bright line separation for MMs as well.

2. Market Monitor Treatment of Confidential Information

a. All Information Collected by the Market Monitor Should be Available to State Commissions

The ICC supports the Commission's statement that, "[s]ince the Commission [FERC] has oversight responsibility for wholesale electric markets, any data collected by the MM would be available to the Commission and the confidentiality of the data would be protected by the

²⁷ See, Comments of the ICC, Midwest ISO, Docket No. ER02-108-007 (July 24, 2002), at 13.

²⁸ Federal Power Act, 16 U.S.C. §§ 824d, 824e.

Commission under its regulations.”²⁹ While any information collected by the MM should be available for review by the Commission, provided that confidentiality is protected, this same treatment should be accorded to state commissions. Like the Commission, state commissions also have responsibility and obligations concerning power markets. Access to information collected by the MM would help state commissions perform their responsibilities. Furthermore, state commissions have much experience with maintaining provisions for confidential treatment of data and information.

b. The Confidentiality to be Accorded to Information Collected by the Market Monitor from Market Participants Requires Clarification

The NOPR states that, “[a]ll information obtained by the monitor that is specific to a market participant would be treated confidentially.”³⁰ This same statement also appears in the proposed SMD Tariff.³¹ The scope of this statement is not clear. First, it should not be presumed that all information collected by the MM from a market participant merits confidential treatment. Rather, the market participant should be responsible for supporting claims for confidential treatment of data and information. Second, it is not clear what the Commission means by information “that is specific to” a market participant. Accordingly, the Commission should clarify this statement.

3. Market Monitor Assessment of Industry Structure and ITP Conduct

The Commission seeks comment on whether the MM should evaluate the ITP’s operations. Specifically, should the MM evaluate whether the ITP is treating market participants neutrally?³² It is the ICC’s position that the MM must be able to monitor and critique all aspects of the operations and practices of an ITP - - including but not limited to market design, provision

²⁹ NOPR, at ¶ 450.

³⁰ *Id.*

³¹ Section IV.H.2.1.5.

³² NOPR, at ¶ 432.

of ancillary services, tariffs, scheduling, interconnection practices, and planning practices, to assure that generation, transmission and demand-response are all fairly evaluated. Such critique will provide greater assurance that the ITP is operating in an efficient manner without discrimination against any market segment. Further, given both the allocation of market functions between the ITCs and ITPs, as well as the MM's responsibility for monitoring all aspects of the ITP, the MM should also have authority to evaluate the operations and governance of any ITCs operating within the ITP.

The MM's review of mergers and acquisitions for market power should be incorporated into the Commission's merger review process. Further, if warranted, the MM's review should include recommendations to alleviate any market power concerns to the Commission, the ITP, and any affected state commissions.

The Commission should require MMs of each ITP to assess inter-ITP cooperation and make recommendations for resolution of any seams issues. Further, there will be a need for close coordination among MMs, the FERC's Office of Market Oversight and Investigation and state commissions.

4. Mitigating "Local Market Power Problems"

The NOPR would require the ITP to enter into a "participating generator agreement" with generators in areas exhibiting "local market power problems."³³ This language seems to limit these areas to those in which there are generators that must run to support the reliable operation of the grid and those areas in which there is significant generation ownership concentration due to transmission constraints. The MM would be charged with determining whether the generator ownership and constraint conditions merit designation of an area as one exhibiting a "local market power problem." However, the MM would, apparently, have no further role with regard

³³ NOPR, at ¶ 399.

to a “local market power problem.” Rather, the ITP would be responsible for negotiating “participating generator agreements” with generators in those areas. The participating generator agreements could include “must-offer” obligations and bid caps.

Market power mitigation in areas described by the Commission as exhibiting “local market power problems” will be necessary. Furthermore, must-offer obligations and bid caps are reasonable ways to address these market power problems. However, while the proposal to address the reliability must-run issues in “participating generator agreements” may work, local market power problems due to generator ownership concentration behind transmission constraints should be addressed in the ITP’s market power mitigation plan developed by the MM, rather than through “participating generator agreements.”

The participating generator agreement approach to addressing ownership concentration local market power problems opens the door to non-uniform and discriminatory treatment of similarly situated generators. Also, because these participating generator agreements will, apparently, be individually negotiated between the ITP and the generator, the ability of other interested stakeholders to monitor and modify the generator agreements could be limited.³⁴ On the other hand, addressing this part of the local market power problem through the ITP’s market power mitigation plan developed by the MM would ensure consistency as well as transparency.

5. The Commission’s Voluntary “Automatic Mitigation Procedure” Should be Mandatory

The Commission proposes a market power mitigation plan composed of three mandatory components: (1) local market power mitigation (as discussed above); (2) a safety-net bid cap;

³⁴ The ICC recognizes the Commission’s proposal to require the participating generator agreements to be filed with the Commission (§ 408). However, transparency would be improved by making the local market power mitigation measures part of the ITP’s market power mitigation plan because the market power mitigation plan will actually be a part of the ITP’s OATT.

and (3) a required resource adequacy requirement.³⁵ The Commission also proposes a fourth voluntary measure that could apply in markets where non-competitive conditions exist.³⁶ Specifically, “The fourth mitigation measure would deal with situations when non-competitive conditions exist, by examining and possibly limiting bids from individual suppliers into the day-ahead and real-time spot markets if those bids are high due to withholding rather than scarcity.”³⁷ Herein, this voluntary measure will be referred to as an automatic mitigation procedure (“AMP”).

Similar to the Commission’s proposal for “local market power” described above, the need for AMP would be identified by the MM. The ICC recommends that, if the MM believes an AMP to be necessary for any of the markets it oversees, then adoption of an AMP by the ITP should be mandatory. Given the current structure and performance of wholesale power markets, the ICC expects that need for an AMP will be widespread. Indeed, given the regional nature of wholesale power markets, AMP may be needed across fairly large regions.

As contrasted with the Commission’s proposal for “local market power” mitigation described above, the AMP (if it is adopted by an ITP) would be administered by the MM through operation of the ITP’s market power mitigation plan, rather than operating through a “participating generator agreement.” The ICC supports that approach.

6. The Market Monitor’s “Penalty” Authority is Not Clear

Section H of the proposed SMD pro forma Network Access Services tariff states, “[t]he Market Monitor is responsible for the enforcement of the rules in this section.”³⁸ Similarly, the

³⁵ The resource adequacy requirement cannot accurately be referred to as a market power mitigation measure. Rather, it is a measure that, if it works, will reduce the need for market power mitigation.

³⁶ NOPR, at ¶ 398-402.

³⁷ NOPR, at ¶ 402.

³⁸ Section IV.H.3.8 (Section H is the Market Power Mitigation and Market Monitoring Section of the proposed SMD tariff).

NOPR states, “if the conduct violates existing rules, the market monitor must have the necessary tools to investigate the conduct and to penalize it.”³⁹ However, contrary to these provisions, the NOPR also states, “the market monitor must have adequate authority to investigate market participant conduct and the [ITP] must have a set of predetermined penalties to apply to conduct that is in violation of the rules of the [ITP’s] tariff.”⁴⁰ The first two statements imply that the MM will enforce and apply penalties and the second implies that the ITP will apply penalties. These statements appear to be in direct contradiction.

The ICC supports the Commission’s statement that, “[a]n important adjunct to the market power mitigation and monitoring plan will be a clear set of rules governing market participant conduct with the penalties for violations clearly spelled out.”⁴¹ However, the ICC position is that the Commission has given unclear and contradictory direction as to how to accomplish this objective and who will accomplish it. Accordingly, the Commission must clarify the issue of market power mitigation enforcement and penalties for market participant failure to comply with market power monitoring and mitigation requirements.

E. RTO/ITP Governance

The ICC commends the Commission for recognizing the importance of achieving independent governance in a regional transmission structure.⁴² In the NOPR, the Commission expresses a concern that the lack of definitive guidance regarding the governance of ITPs/RTOs may be hindering their development.⁴³ The Commission also expresses concern that the existing stakeholder process does not adequately represent the interests of all market participants

³⁹ NOPR, at ¶ 444 (underlining added).

⁴⁰ NOPR, at ¶ 454 (underlining added).

⁴¹ NOPR, at ¶ 445.

⁴² See, NOPR, at ¶ 556.

⁴³ NOPR, at ¶ 557.

and interested parties.⁴⁴ In an effort to address these concerns, the Commission proposes to require all RTOs to satisfy specific governance requirements. Specifically, the Commission intends to more clearly define responsibilities of an RTO's Board, and more specifically define the role of stakeholders regarding the selection of Board members.⁴⁵

The ICC supports the Commission's objectives for RTO/ITP Board independence, as well as Board quality and clarity in Board obligations with respect to competitive market development. However, the NOPR's specific prescriptions with respect to Board member selection, Board member replacement, and Board member terms are arbitrary and constitute unnecessary standardization that may stifle legitimate creativity in these RTO governance elements. Accordingly, the ICC recommends greater flexibility by the Commission in these areas on a case-by-case basis.

1. Responsibilities of the Board of Directors

Under the Commission's proposal, the Board will have a clear mandate to operate the transmission system in a manner conducive to the development of a competitive wholesale market. In particular, the Board is charged with ensuring that markets overseen by an RTO are operated in a fair, efficient and non-discriminatory manner.⁴⁶ Further, the Board's focus is to be on the interests of the wholesale market and not the interests of particular market participants or classes of market participants.⁴⁷ The Board is also required to monitor the operation of the markets within its region to both identify the ability to exercise market power and propose solutions.⁴⁸ The Board is not to be a stakeholder board with industry segments given specific

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ NOPR, at ¶ 558

⁴⁷ *Id.*

⁴⁸ *Id.*

seats on the board.⁴⁹ Finally, the NOPR states that the Board’s interests should be “aligned with the interests of the market as a whole rather than with particular market participants of market segments.”⁵⁰

The first step in achieving an adequate governance structure is to ensure the independence of the Board. Once that is accomplished, explicit language directing the Board of an RTO to operate its transmission system in a fair and non-discriminatory manner is a key element in the development of a competitive wholesale market for electricity. While the Midwest ISO’s current transmission owners’ agreement contains language intended to ensure the independence of the Board from market participants and to ensure that transmission revenues are maximized and properly distributed to the transmission owners, there is no language specifically directing the Board of the Midwest ISO to operate in the interest of the wholesale markets.⁵¹ Without explicit language directing the Board to operate in the interests of the entire market, the potential exists for the Board to favor particular stakeholder interests, instead of serving as an advocate for a well-functioning market that benefits all parties. Accordingly, the ICC supports the Commission’s proposed requirement that all new and existing RTOs adopt explicit language requiring the Board to operate in the interests of the wholesale market and not a particular class of market participants.

2. Selection of Board Members

In the NOPR, the Commission specified a particular process to be used for the selection of initial RTO Board members that involves a nominating committee whose members will be selected from the stakeholder sectors. The Commission also proposes both specific term lengths

⁴⁹ NOPR, at ¶ 559.

⁵⁰ NOPR, at ¶ 556.

⁵¹ See, *Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc.*, Article Three and Appendix A.

and the staggering of the terms of Board members. In particular, one half of the Board will have terms of four years and the other half have terms of three years.⁵² Further, the Board members will not be allowed to serve more than two consecutive terms.⁵³ The Commission should be more flexible in its RTO Board selection process.

The NOPR indicates that the nominating committee will be made up of two members from each of the stakeholder sectors.⁵⁴ Among other things, the nominating committee is charged with selecting the initial Board.⁵⁵ The ICC position is that the nominating committee process is flawed because it inherently requires individual stakeholders within a sector to permit another stakeholder from within their sector to represent their interests in important votes such as Board member selection. This flaw will be particularly problematic in stakeholder sectors where there is significant internal diversity of interests within the sector.

The ICC acknowledges that, in crafting a Board selection process, there will always be tension between Board independence and allowing all interested stakeholders to have a meaningful role in the Board selection process. However, that tension cannot be eliminated by requiring, as the Commission proposes in the NOPR, that Board members be selected by only a subset of interested stakeholders.

The ICC recommends that the Commission simply specify in the rule the characteristics it desires to see in a Board (e.g. independence, expertise, integrity, etc.) and review proposals from RTO proponents as to how to achieve those objectives on a case-by-case basis. Similarly, the Commission should allow for flexibility in setting term lengths and limits in order to encourage the development of all reasonable alternative processes for Board participation in the

⁵² NOPR, at ¶ 569.

⁵³ *Id.*

⁵⁴ NOPR, at ¶ 566.

⁵⁵ *Id.* Notably, while the NOPR is very prescriptive in specifying a process for most Board vacancies, it does not address in any way how Board seats that open due to the expiration of a Board member's second term will be filled.

various regions. The Commission should evaluate the proposals independently on their merits, with comment opportunities open to all interested parties.

F. Liability Limitations With Respect To Claims Of Third Parties Should Remain A Matter Of State Law Where Protection Exists

In the NOPR, the Commission points out that some entities have sought to revise their OATTs to include liability provisions, arguing that no federal forum exists for entities that are now subject to Commission jurisdiction only and can no longer seek relief at the state level.⁵⁶ The Commission was “not prepared to propose a specific [liability] provision” for inclusion in the pro forma tariff.⁵⁷ In so doing, the Commission posed a number of questions regarding whether it should consider including a limitation on liability— particularly for independent transmission providers that would no longer be subject to state jurisdiction. The ICC position is that where liability protection is available at the state level, the Commission should continue to defer to states on liability limitations with regard to third parties.

This question has arisen in the Midwest. On June 5, 2002, the Midwest Independent Transmission System Operator, Inc. (“Midwest ISO”) and the American Transmission Company LLC (“ATC”) filed proposed revisions to the Midwest ISO OATT, seeking to reverse FERC’s long-standing policy that liability limitations with respect to claims of third parties should be a matter of state law. On July 2, 2002, the ICC filed comments in that proceeding,⁵⁸ arguing against the Midwest ISO’s proposed change in the service liability standard which would limit the liability of both the Midwest ISO and its transmission owners (“TOs”) for damages related to

⁵⁶ NOPR, at ¶ 387.

⁵⁷ *Id.*, at ¶ 388.

⁵⁸ *Midwest Independent Transmission System Operator, Inc., American Transmission Company LLC*, Docket Nos. ER02-2033-000 and ER02-2033-001, July 2, 2002 (hereinafter “July 2nd Comments”).

services provided under the OATT. The ICC pointed out that the state provided adequate liability protection for the TOs, which continue to be regulated in Illinois.⁵⁹

On August 1, 2002, FERC issued an order on proposed tariff revisions addressing the Midwest ISO proposal to limit liability.⁶⁰ In conditionally accepting for filing the proposed revisions, as revised as ordered, FERC ordered the removal of certain proposed caps on liability. It said that important issues regarding limitations on liability would be thoroughly examined in an industry-wide context in the SMD generic rulemaking proceeding. Thus, the ICC herein renews its support of FERC's policy that liability limitations with respect to claims of third parties should be a matter of state law.

The Commission raised a number of questions in the NOPR regarding the appropriateness of liability provisions in pro forma tariff.⁶¹ The ICC position is that incorporating liability provisions into the *pro forma* ITP transmission tariff is unnecessary and inappropriate, as it would represent a substantial departure from the Commission's policy on this issue.⁶²

The United States Court of Appeals supports the traditional FERC position. In addressing the question of incorporating a liability provision in the OATT in Order No. 888, the United States Court of Appeals agreed that "[FERC's] indemnification provision does not preclude the states from shielding utilities from liability for ordinary negligence. States did so before, through both their regulatory commissions and their courts, and they remain free to do so under Order 888."⁶³

⁵⁹ July 2nd Comments, at 4 - 8.

⁶⁰ *Midwest Independent Transmission System Operator, Inc.*, 100 FERC ¶ 61,144 (2002).

⁶¹ NOPR, at ¶ 389

⁶² *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, at 729 (D.C. Cir. 2000), *aff'd* 122 S. Ct. 1012 (2002).

⁶³ *Id.*

Even in the context of RTO formation, the policy has been clear. In *Grid Florida LLC et al.*,⁶⁴ the Commission rejected an attempt by an RTO applicant to limit its liability. The Commission pointed to Order No. 888 and explained that the “pro forma tariff does not address, and was not intended to address liability. Rather, . . . transmission providers may rely on state laws, when and where applicable, protecting utilities or others from claims founded in ordinary negligence.”⁶⁵ The Commission found that “RTO participants have alternatives with respect to liability matters. . . . There is nothing in the pro forma tariff that would preclude those entities from relying ‘on the protection of state laws, when and where applicable protecting utilities or others from claims founded in ordinary negligence’ or intentional wrongdoing.”⁶⁶ That is still the case.

In an attempt to justify a departure from this policy, some entities, such as the Midwest ISO for example, have raised a concern that “once unbundled from distribution, and thus removed from state utility tariffs, transmission assets are no longer protected from service interruption liability.”⁶⁷ They say that “RTOs, ISOs and transmission-only companies are solely regulated by FERC for all aspects of their provision of transmission services.”⁶⁸ However, the transmission-owning members of some transmission providing entities, like the Midwest ISO, continue to be state regulated and have only transferred functional control over transmission assets that continue to be owned and operated by the traditional utility. The utilities’ transfer of

⁶⁴ *GridFlorida LLC, Florida Power & Light Co., Florida Power Corporation, Tampa Electric Co.*, 94 FERC ¶ 61,363 (2001) (*hereinafter*, “*GridFlorida*”).

⁶⁵ *Id.*, at 62,334; *see Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats & Regs. ¶ 31,036 (1996), *order on reh’g* Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248, at 30,300-01 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046, at 62,080-81 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York, et al. v. FERC*, 122 S. Ct. 1012 (2002).

⁶⁶ *GridFlorida* at 62,334.

⁶⁷ Transmittal Letter, *Midwest Independent Transmission System Operator, Inc., American Transmission Company LLC*, Docket Nos. ER02-2033-000 and ER02-2033-001 at 3.

⁶⁸ *Id.*

functional control over transmission facilities to RTOs does not constitute the “transmission assets” being “unbundled from distribution” as they assert. In Illinois, for example, “transmission assets” have not been removed from “state utility tariffs.” Section 16-103(c) of the Illinois Public Utilities Act (“PUA”) states,

Notwithstanding any other provision of this Article, each electric utility shall continue offering to all residential customers and to all small commercial retail customers in its service area, as a tariffed service, bundled electric power and energy delivered to the customer’s premises consistent with the bundled utility service provided by the electric utility on the effective date of this amendatory Act of 1997.⁶⁹

Thus, the Illinois utilities must provide bundled retail service, which includes both distribution and transmission.⁷⁰

In addition, Section 8-406 of the Illinois PUA provides for expansive Illinois jurisdiction over transmission siting and certification issues. Section 16-125 of the Illinois PUA comprehensively addresses reliability standards and reporting requirements that cover both distribution and transmission service. Furthermore, the ICC rules and tariffs establish standards for the provision of service, which includes transmission.⁷¹

Indeed, state legislatures and state regulators have, over the years, established a comprehensive legal framework for regulating all aspects of utilities’ retail service. Therefore, the ICC urges the Commission to maintain its long-standing policy of deferring to the states on the issue liability limitation with respect to third parties where such protection exists.

G. Bundled Retail Transmission

The ICC supports the Commission’s policy goal of eliminating undue discrimination where it exists in interstate transmission service. In the NOPR, the Commission identifies

⁶⁹ 220 ILCS 5/16-103(c).

⁷⁰ See, e.g., PUA Section 16-103.

⁷¹ See, e.g., Part 411 of the Illinois Administrative Code.

numerous examples of undue discrimination under the current OATTs (e.g., balancing advantages, greater receipt and delivery point flexibility, transfer capability set-asides for reliability and forecasted load growth, and curtailment advantages).⁷² The Commission identifies electric utility vertical integration as the structural source of much of this undue discrimination.⁷³ To eliminate this undue discrimination, the Commission has proposed to assert jurisdiction over all transmission service in interstate commerce, including the interstate transmission component of bundled retail service, and to create a tariff mechanism for treating all load-serving entities (traditional utilities and non-traditional alternative retail electric suppliers) consistently. Indeed, the Commission argues that Section 206 of the Federal Power Act requires the Commission to remedy undue discrimination where it is found.⁷⁴

The ICC has historically regulated utility bundled retail service in the state of Illinois. Nevertheless, it has consistently supported the process of electricity industry restructuring as directed by the Illinois General Assembly and has responded accordingly to the Illinois General Assembly's orders directing the ICC to promote a competitive electricity market in the state of Illinois and to encourage the entry of alternative retail electric suppliers into the Illinois market.⁷⁵ Indeed, ICC compliance with the Illinois General Assembly's directive to promote a competitive market in Illinois and to encourage new entrants may be consistent with acceptance of FERC's assertion of jurisdiction over the transmission component of bundled retail service if such consolidation of transmission responsibility is a prerequisite to development of a competitive market as many industry analysts have argued.⁷⁶ With respect to "delivery services," the Illinois

⁷² NOPR, at ¶ 69.

⁷³ NOPR, at ¶ 31.

⁷⁴ NOPR, at ¶ 102.

⁷⁵ Electric Service Customer Choice and Rate Relief Law of 1997, 220 ILCS 5/16-101.

⁷⁶ A competitive wholesale power market is a prerequisite for a competitive retail power market and FERC argues that uniform transmission jurisdiction is a necessary condition for wholesale power market development.

Public Utilities Act states, “[a]n electric utility shall provide the components of delivery services that are subject to the jurisdiction of the Federal Energy Regulatory Commission at the same prices, terms and conditions set forth in its applicable tariff as approved or allowed into effect by that Commission.”⁷⁷

The ICC acknowledges the Commission’s statements that it does “not intend to interfere with the legitimate concerns of state regulatory authorities”⁷⁸ and that “[b]undled retail customers would continue to receive service from their existing load-serving entity; however, the load-serving entity would be required to take service under the new Network Access Service pro forma tariff in order to serve those retail customers.”⁷⁹ The ICC recognizes, as does the Commission,⁸⁰ that some RTO’s, including the Midwest ISO and PJM already operate with tariffs under which all load-serving entities take transmission, including traditional public utilities serving bundled retail load, and so, implementation of the Commission’s SMD proposal with respect to bundled retail service will not constitute a change in these areas.⁸¹ The ICC also recognizes that proper treatment of congestion revenue rights (“CRRs”) and auction revenue rights under FERC’s proposed new market design can assist greatly in ensuring that the service rights of existing customers are maintained.⁸²

Even so, the ICC urges the Commission, should it proceed in its implementation of SMD and its assertion of jurisdiction over the interstate transmission component of bundled retail service, to be sensitive to and to work within Illinois’ retail access framework. The

⁷⁷ See, PUA Section 16-108.

⁷⁸ NOPR, at ¶ 16.

⁷⁹ NOPR, at ¶ 370.

⁸⁰ NOPR, at ¶ 120.

⁸¹ See e.g. 97 FERC 61,033 at 61,170 where the Commission directed the Midwest ISO to revise its OATT to “Place and provide all load under the Midwest ISO’s tariff”.

⁸² NOPR, at ¶ 376. The ICC plans to address the issue of congestion revenue rights and auction revenue rights in subsequent Comments in accordance with the Commission’s Comment schedule.

Commission's policies should complement Illinois' statutory retail access framework, not conflict with or undermine it. The State of Illinois passed comprehensive electricity deregulation legislation in 1997 that phases in open access at the retail level.⁸³ One of the key components to that legislative balance was a retail rate freeze that has been extended through the end of 2006.⁸⁴ The Commission should not undertake any actions that could risk disrupting this retail rate freeze balance.

Similarly, after the expiration of the retail rate freeze, the State of Illinois and the ICC will continue to have an interest in ensuring just and reasonable rates for retail ratepayers, as well as reliable and efficient local delivery service.

The ICC will be closely monitoring the Commission's Standard Market Design proceeding, ongoing RTO implementation efforts, and the Commission's continuing efforts to promote competitive wholesale power markets. These Commission activities must not be allowed to contradict or undermine in any way the Illinois Legislative framework for competitive power markets and reliable service. The ICC urges the Commission to partner with the ICC in this regard to advance our common agendas and to avoid compromising or undermining the Illinois statutory framework for competition in the provision of electricity.

V. CONCLUSION

For the aforementioned reasons, the Illinois Commerce Commission respectfully requests that the Commission: (1) proceed directly toward full participation by transmission-owning utilities in properly designed and configured RTOs, rather than adopting the interim ITP approach; (2) clarify the proper relationship between ITCs and RTOs; (3) ensure the integrity and efficiency of standard market design by (a) eliminating the CBM features that favor

⁸³ Electric Service Customer Choice and Rate Relief Law of 1997, 220 ILCS 5/16-101.

⁸⁴ Public Act 92-0537, 220 ILCS 5/16-102.

traditional utilities over new entrants, (b) eliminating the ability of transmission owners to manipulate transmission transfer capability, and ensuring ITP transmission capability calculation transparency, and (c) continuing to use the seven-factor test to determine which transmission facilities should be under the control of the ITP; (4) establish a Market Monitor that is independent of both the ITP/RTO and all market participants, accountable to the Commission and endowed with the necessary authorities and tools to allow the it to ensure the creation and continuation of competitive wholesale power markets; (5) adopt a flexible process for Board member selection and require the Boards of all ITPs/RTOs to operate in the interest of competitive wholesale electricity markets; (6) continue to defer to states on liability limitations with regard to third parties, where protection is available at the state level; and (7) proceed with policies to eliminate undue discrimination in interstate transmission service, but only in ways that will complement Illinois' retail open access framework.

Respectfully submitted,

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ILLINOIS COMMERCE COMMISSION

Dated: November 15, 2002

CERTIFICATE OF SERVICE

I hereby certify that I caused copies of the foregoing document of the Illinois Commerce Commission to be served this day upon each person designated on the official service list compiled by the Secretary in this proceeding, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Chicago, Illinois, this 15th day of November, 2002.